



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XG888**

**Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the South Basin Improvements Project at the San Francisco Ferry Terminal**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; incidental harassment authorization; request for comments on proposed Renewal.

**SUMMARY:** NMFS received a request from the San Francisco Bay Area Water Emergency Transportation Authority (WETA) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to the Downtown San Francisco Ferry Terminal Expansion Project in San Francisco, California. These activities consist of activities that are covered by the current authorization but will not be completed prior to its expiration. Pursuant to the Marine Mammal Protection Act (MMPA), prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period.

**DATES:** Comments and information must be received no later than **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Carduner@noaa.gov*.

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Jordan Carduner, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act*. In case of problems accessing these documents, please call the contact listed above.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small

numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-year IHA Renewal when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for

completion of the activities beyond that described in the Dates and Duration section of the initial IHA. All of the following conditions must be met in order to issue a Renewal:

- A request for Renewal is received no later than 60 days prior to expiration of the current IHA;
- The request for Renewal must include the following:
  - (1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements; and
  - (2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized;
- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the initial findings remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our web site at: [www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals](http://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals). Any comments received on the potential Renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

## **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the IHA Renewal qualifies to be categorically excluded from further NEPA review. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

## **History of Request**

On May 31, 2018, NMFS issued an IHA to WETA to take marine mammals incidental to pile driving activities associated with the Downtown San Francisco Ferry Terminal Expansion Project, South Basin Improvements Project in San Francisco, California, effective from June 1, 2018, through May 30, 2019 (83 FR 28826; June 21, 2018). On March 5, 2019, NMFS received an application for the Renewal of that IHA. As described in the application for Renewal, the activities authorized in the initial IHA would not be completed by the time that IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section of the initial IHA. As required, the applicant also provided a preliminary monitoring report (available at [www.fisheries.noaa.gov/action/incidental-take-authorization-sf-](http://www.fisheries.noaa.gov/action/incidental-take-authorization-sf-)

*bay-area-water-emergency-transportation-authority-ferry-0*) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

### **Description of the Specified Activities and Anticipated Impacts**

WETA proposes to continue to expand the berthing capacity at the Downtown San Francisco Ferry Terminal, located at the San Francisco Ferry Building, to support existing and future planned water transit services operated on San Francisco Bay by WETA and WETA's emergency operations. The Downtown San Francisco Ferry Terminal Expansion Project includes the construction of three new water transit gates and overwater berthing facilities, in addition to supportive landside improvements, such as additional passenger waiting and queueing areas, circulation improvements, and other water transit-related amenities. The new gates and other improvements would be designed to accommodate future planned water transit services between Downtown San Francisco and Antioch, Berkeley, Martinez, Hercules, Redwood City, Richmond, and Treasure Island, as well as emergency operation needs. All piles would be driven during the authorized in-water work window of June 1 to November 30, 2019.

The specified activities described for this renewal are an identical subset of the activities covered by the initial 2018 IHA. NMFS previously published notices of proposed IHA (83 FR 18507; April 27, 2018) and issued IHA (83 FR 28826; June 21, 2018). These documents, as well as WETA's initial IHA application and the preliminary monitoring report for the previously issued IHA, are available at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sf-bay-area-water-emergency-transportation-authority-ferry-0>.

Similarly, the anticipated impacts are identical to those described in the initial IHA.

Specifically, we anticipate the take of seven marine mammal stocks (including three cetacean and four pinniped stocks), by Level B harassment only, incidental to noise as a result of pile driving associated with the proposed activities. WETA was not able to complete the pile driving activities analyzed in the initial IHA by the date that IHA is set to expire and anticipates the need for additional piles driving to complete the project in 2019.

The following documents are referenced in this notice and include important supporting information, and may be found at the indicated location:

- Initial Proposed IHA: Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the South Basin Improvements Project at the San Francisco Ferry Terminal (83 FR 18507; April 27, 2018). Available at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sf-bay-area-water-emergency-transportation-authority-ferry-0>;
- Initial Final IHA. Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the South Basin Improvements Project at the San Francisco Ferry Terminal (83 FR 28826; June 21, 2018). Available at: : <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sf-bay-area-water-emergency-transportation-authority-ferry-0>; and
- Preliminary Monitoring Report from Initial IHA. Available at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sf-bay-area-water-emergency-transportation-authority-ferry-0>.

#### *Detailed Description of the Activity*

As described above, WETA was not able to complete the activities analyzed in the initial IHA by the date that IHA is set to expire (June 1, 2019). As such, the activities WETA proposes to conduct in 2019 would be a continuation of the activities as described in the initial 2018 IHA and would be identical to the activities analyzed in the initial IHA (same location, equipment, methods, and seasonality). The initial IHA analyzed the potential impacts to marine mammals from the construction of new water transit gates and other improvements to the ferry terminal.

The new water transit gates and other improvements are designed to accommodate future planned water transit services, including an increase in peak-period WETA vessel arrivals from 14 to approximately 30, and an expansion of WETA services to accommodate more weekday passengers.

Construction of the project improvements requires pile driving. Pile driving for the project includes impact or vibratory pile driving associated with construction of the berthing structures, the Embarcadero Plaza, and East Bayside Promenade. Pile driving would occur during daylight hours only and one hammer would be used at a time. Vibratory driving of 24-in and 30-in piles may take up to 15 minutes per pile while vibratory driving of 36-in piles may take up to 20 minutes per pile. Piles driven with an impact hammer would require an estimated 1800 strikes per pile, regardless of pile size. Underwater sound resulting from pile driving could result in the harassment of marine mammals.

Much of the pile driving associated with the project was completed in 2017 and 2018 and was covered previous IHAs. All pile driving completed in 2017 and 2018 was vibratory; no impact pile driving was conducted. The numbers of each pile size that were planned to be driven during 2018 are shown in Table 1 of the 2018 IHA application (available at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sf-bay-area-water-emergency-transportation-authority-ferry-0>). WETA planned to install 81 steel piles, ranging in diameter from 24 to 36 in in diameter, during 2018. However, as described above, WETA was not able to complete all pile driving in 2018 as planned and therefore proposes to complete pile driving associated with the proposed activities in 2019. WETA installed a total of 52 piles in 2018 over approximately 21 construction days, and anticipates a total of 29 additional piles would need to be installed in 2019 to complete the project. Thus, the total number of piles driven



in 2018 and 2019 combined would not exceed the total number described and analyzed in the previously issued IHA (81 piles total). A minor change in design plans would result in the installation of five more 36-inch piles and five less 24-in piles that originally planned to complete the work. The proposed Renewal would be effective for a period of one year from the date of issuance.

### **Description of Marine Mammals**

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the Notice of proposed IHA (83 FR 18507; April 27, 2018) for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

### *Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the Notice of proposed IHA for the initial authorization (83 FR 18507; April 27, 2018). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

### *Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the Notice of proposed IHA (83 FR 18507; April 27, 2018) and issued IHA for the initial authorization (83 FR 28826; June 21, 2018). The pile driving equipment that may result in take, as well as the source levels, marine mammal stocks taken, marine mammal density data and the methods of take estimation applicable to this authorization remain unchanged from the previously issued IHA.

Authorized takes would primarily be by Level B harassment as exposure to acoustic sources (*i.e.*, impact and vibratory pile driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for harbor seals and California sea lions due to larger predicted auditory injury zones.

As described above, WETA completed the installation of 52 piles in 2018 and proposes to install 29 piles to complete the project in 2019. Piles would include 24-in, 30-in, and 36-in piles. The number of piles for each respective size proposed for installation in 2019 are shown in Table 1.

**Table 1. Number and Sizes of Piles Proposed for Installation in 2019, and Estimated Duration of Pile Driving.**

Pile Diameter	Number to be installed	Number of piles installed per day	Estimated construction duration (days)
24-in	6	2.5	2
30-in	8	3	3
36-in	15	2	8
<b>TOTAL</b>	<b>29</b>	<b>n/a</b>	<b>13 days</b>

Distances to the isopleths corresponding to the Level B harassment threshold for each pile size and type are shown in Table 2. Distances to the isopleths corresponding to the Level A

harassment thresholds for the various marine mammal functional hearing groups, by pile size and type, are shown in Table 3. Descriptions of the modeling methods used to determine the distances shown in Tables 2 and 3 are described in detail in the Notice of Issued IHA (83 FR 28826; June 21, 2018) for the initial IHA. These methods have not changed from the initial IHA, and all values shown in Table 2 and 3 have not changed from the initial IHA. No impact driving has been conducted on the project thus far and vibratory driving will be the most likely method of installation during 2019 as well; however, the use of an impact hammer to install piles may be required in 2019 and the potential for impact driving is therefore included in the take analysis.

**Table 2. Distances to Isopleths Corresponding to the Level B Harassment Threshold.**

<b>Pile Size and Installation Method</b>	<b>Distance to Level B Harassment Threshold (m)</b>
24-in Vibratory	651
24-in Impact	341
30-in Vibratory	450
30-in Impact	341
36-in Vibratory	940
36-in Impact	541

**Table 3. Distances to Isopleths Corresponding to Level A Harassment Thresholds.**

<b>Pile Size and Installation Method</b>	<b>Distance to Level A Harassment Threshold (m)</b>				
	<b>Low-Frequency Cetaceans</b>	<b>Mid-Frequency Cetaceans</b>	<b>High-Frequency Cetaceans</b>	<b>Phocid Pinnipeds</b>	<b>Otariid Pinnipeds</b>
24-in Vibratory	3.1	< 1	4	2	< 1
24-in Impact	418	15	498	224	16
30-in Vibratory	2	< 1	3	1	<1
30-in Impact	418	15	498	224	16
36-in Vibratory	5	< 1	7	4	< 1
36-in Impact	801	29	954	429	31

As the number of pile driving days that would occur in 2019 is less than the number of pile driving days analyzed in the previous IHA, the number of takes estimated to occur in 2019, and proposed for authorization, has changed from the number of takes authorized in the initial IHA. Take numbers authorized in the initial IHA are shown in Table 11 of the 2018 Notice of Issued IHA (83 FR 28826; June 21, 2018), available at:

<https://www.fisheries.noaa.gov/action/incidental-take-authorization-sf-bay-area-water-emergency-transportation-authority-ferry-0>).

The number of takes proposed for authorization for this IHA, for each marine mammal stock, are shown in Table 4. Auditory injury (*i.e.*, Level A harassment) is unlikely to occur for cetaceans, however, take by Level A harassment of harbor seals and California sea lions are proposed for authorization given their increased presence in the nearshore waters of the project site and the relatively large Level A harassment zones, especially for 36-in piles.

**Table 4. Total Takes Proposed for Authorization.**

<b>Species</b>	<b>Takes by Level A harassment</b>	<b>Takes by Level B harassment</b>	<b>Total Takes Proposed for Authorization</b>
Harbor seal	20	83	103
Northern fur seal	0	10	10
California sea lion	8	92	100
Northern elephant seal	0	13	13
Gray whale	0	4	4
Bottlenose dolphin	0	30	30
Harbor porpoise	0	32	32

### **Description of Proposed Mitigation, Monitoring and Reporting Measures**

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the Notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for this renewal:

#### *General Construction Measures*

A Spill Prevention Control and Countermeasure (SPCC) plan has been prepared to address the emergency cleanup of any hazardous material, and will be available onsite. The SPCC plan incorporates SPCC, hazardous waste, stormwater, and other emergency planning

requirements. In addition, the project will comply with the Port's stormwater regulations.

Fueling of land and marine-based equipment will be conducted in accordance with procedures outlined in the SPCC. Well-maintained equipment will be used to perform work, and except in the case of a failure or breakdown, equipment maintenance will be performed offsite. Equipment will be inspected daily by the operator for leaks or spills. If leaks or spills are encountered, the source of the leak will be identified, leaked material will be cleaned up, and the cleaning materials will be collected and properly disposed. Fresh cement or concrete will not be allowed to enter San Francisco Bay. All construction materials, wastes, debris, sediment, rubbish, trash, fencing, etc. will be removed from the site once project construction is complete, and transported to an authorized disposal area.

#### *Pile Driving*

Pre-activity monitoring will take place from 30 minutes prior to initiation of pile driving activity and post-activity monitoring will continue through 30 minutes post-completion of pile driving activity. Pile driving may commence at the end of the 30-minute pre-activity monitoring period, provided observers have determined that the shutdown zone (described below) is clear of marine mammals, which includes delaying start of pile driving activities if a marine mammal is sighted in the zone, as described below. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown zone and surrounding waters must be visible to the naked eye).

If a marine mammal approaches or enters the shutdown zone during activities or pre-activity monitoring, all pile driving activities at that location shall be halted or delayed, respectively. If pile driving is halted or delayed due to the presence of a marine mammal, the activity may not resume or commence until either the animal has voluntarily left and been

visually confirmed beyond the shutdown zone and 15 or 30 minutes (for pinnipeds/small cetaceans or large cetaceans, respectively) have passed without re-detection of the animal. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than thirty minutes.

For all pile driving activities, a minimum of one protected species observed (PSO) will be required, stationed at the active pile driving rig or at the best vantage point(s) practicable to monitor the shutdown zones for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. Two PSOs will be required on days when impact pile driving occurs.

Monitoring of pile driving will be conducted by qualified PSOs (see below) who will have no other assigned tasks during monitoring periods. WETA will adhere to the following conditions when selecting observers:

- Independent PSOs will be used (*i.e.*, not construction personnel);
- PSOs must have prior experience working as a marine mammal observer during construction activities; and
- WETA will submit PSO CVs for approval by NMFS.

WETA will ensure that observers have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities

were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

To prevent Level A take of cetaceans, elephant seals, and Northern fur seals, shutdown zones equivalent to the Level A harassment zones would be established. If the Level A harassment zone is less than 10 m, a minimum 10 m shutdown zone will be enforced. WETA will implement shutdown zones as follows:

**Table 5. Proposed Pile Driving Shutdown Zones.**

Pile Size and Installation Method	Shutdown Zone (m)				
	Low-Frequency Cetaceans	Mid-Frequency Cetaceans	High-Frequency Cetaceans	Otariid Pinnipeds	Phocid Pinnipeds
24-in Vibratory	10	10	10	10	10
24-in Impact	420	15	500	16	30 for harbor seals, 224 for all other species
30-in Vibratory	10	10	10	10	10
30-in Impact	420	15	500	16	30 for harbor seals, 224 for all other species
36-in Vibratory	10	10	10	10	10
36-in Impact	800	30	955	30	30 for harbor seals, 430 for all other species

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the Level B harassment zones, pile driving and removal activities must cease immediately using delay and shutdown procedures. Similarly, if a species for which take by Level A harassment has not been authorized, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the Level A harassment zones, pile

driving and removal activities must cease immediately. Activities must not resume until the animal has been confirmed to have left the area or 15 or 30 minutes (pinniped/small cetacean or large cetacean, respectively) has elapsed.

Piles driven with an impact hammer will employ a “soft start” technique to give fish and marine mammals an opportunity to move out of the area before full-powered impact pile driving begins. This soft start will include an initial set of three strikes from the impact hammer at reduced energy, followed by a 30 second waiting period, then two subsequent three-strike sets. Soft start will be required at the beginning of each day’s impact pile driving work and at any time following a cessation of impact pile driving of 30 minutes or longer.

Impact hammers will be cushioned using a 12-in thick wood cushion block. WETA will also employ a bubble curtain during impact pile driving. WETA will implement the following performance standards:

- The bubble curtain must distribute air bubbles around 100 percent of the piling perimeter for the full depth of the water column;
- The lowest bubble ring shall be in contact with the mudline for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent mudline contact. No parts of the ring or other objects shall prevent full mudline contact; and
- WETA shall require that construction contractors train personnel in the proper balancing of air flow to the bubblers, and shall require that construction contractors submit an inspection/performance report for approval by WETA within 72 hours following the performance test. Corrections to the attenuation device to meet the performance standards shall occur prior to impact driving.

Based on our evaluation of the applicant’s proposed measures, NMFS has determined that the mitigation measures provide the means of effecting the least practicable impact on the



affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

## **Public Comments**

As noted previously, NMFS published a notice of proposed IHA (83 FR 18507; April 27, 2018) and solicited public comments on both our proposal to issue the initial IHA and on the potential for a Renewal, should certain requirements be met. All public comments were addressed in the notice announcing the issuance of the initial IHA. Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the 2018 IHA.

*Comment:* The Marine Mammal Commission (Commission) requested clarification of certain issues associated with NMFS's notice that one-year Renewals can be issued in certain limited circumstances and expressed concern that the process would bypass the public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of Renewals through a more general route, such as a rulemaking, instead of notice in a specific authorization. The Commission further recommended that if NMFS did not pursue a more general route, that the agency provide the Commission and the public with a legal analysis supporting our conclusion that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA.

*Response:* The notice of the proposed initial IHA expressly notified and invited comment from the public on the possibility that under certain, limited conditions the applicant could seek a Renewal IHA for an additional year. The notice described the conditions under which such a Renewal request could be considered and expressly sought public comment in the event such a Renewal were sought. Further, since issuance of the initial IHA NMFS has modified the

Renewal process to provide notice through the **Federal Register** and an additional 15-day public comment period at the time the Renewal IHA is requested. NMFS also will provide direct notice of the proposed Renewal to those who commented on the initial IHA, to provide an opportunity to submit any additional comments.

We appreciate the Commission's suggestion that NMFS discuss the potential for IHA Renewals through a more general route, such as a rulemaking. However, utilizing the public comment process associated with IHAs is more efficient for the agency, while still providing for appropriate public input into NMFS' decision-making. Further, NMFS' recent modification to the Renewal process (*i.e.*, soliciting additional public comment at the time of a Renewal request) should alleviate the Commission's concern about the lack of additional public comment and need for a more general rulemaking.

For more information, NMFS has published a description of the Renewal process on our web site at: [www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals](http://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals).

### **Preliminary Determinations**

WETA's proposed activity is identical to the activity analyzed in our previously issued notices of proposed IHA and issued IHA (with the exception of the number of piles proposed for installation, which is less than the number analyzed in those documents). We concluded that the initial IHA would have a negligible impact on all marine mammal stocks and species and that the taking would be small relative to population sizes. The marine mammal information, potential effects, and the mitigation and monitoring measures remain the same as those analyzed in the previously issued notices of proposed IHA and issued IHA, therefore the extensive analysis, as well as the associated findings, included in the prior documents remain applicable.

The only differences between the initial IHA and this proposed Renewal is that the number of piles proposed for installation, and the numbers of marine mammal takes expected to occur incidental to the proposed activities, are lower than the numbers analyzed and authorized in the previously issued IHA. As both the number of piles proposed for installation and the number of takes expected to occur, and proposed for authorization, are lower than in the initial IHA, we have concluded that the effects of the proposed Renewal would be the same or less than those that were analyzed in the notices of the initial proposed IHA and issued IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) WETA's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

### **Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. No incidental take of ESA-listed species is proposed for authorization or expected to result from WETA's proposed activity.

Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

### **Proposed Renewal and Request for Public Comment**

As a result of these preliminary determinations, NMFS proposes to issue an IHA Renewal to WETA for conducting ferry terminal expansion activities at the Downtown San Francisco Ferry Terminal, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed Renewal, and any other aspect of this Notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: May 3, 2019.

Donna S. Wieting,

Director,

Office of Protected Resources,

National Marine Fisheries Service.

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